IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1103 of 2002
with
CIVIL REVISION APPLICATION No 1104 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PATEL DINESHBHAI MOHANBHAI

Versus

DECD. NARANBHAI RAMDAS THRO' LEGAL HEIRS

Appearance:

1. Civil Revision Application Nos. 1103 & 1104 of 2002

MR BS PATEL for Petitioner No. 1-3

MRS RANJAN B PATEL for Petitioner No. 1-3

..... for Respondent No. 1

MR DHAVAL D VYAS for Respondent No. 1/1-1/5

RULE SERVED for Respondent No. 2-4

MR SHITAL R PATEL for Respondent No. 5

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 23/09/2004 &
24/09/2004

COMMON ORAL JUDGEMENT

Since common point is involved in both these Civil Revision Applications, both are disposed of by this common judgement.

So far as Civil Revision Application No.1103/2002 is concerned, the same is filed by the original plaintiffs of Special Civil Suit No.194/1988 challenging the order dated 20th September, 2002, passed below Exh.59 by the learned 4th Civil Judge (S.D.) Vadodara, by which the learned Judge has rejected the withdrawal pursis filed by the applicants of this Civil Revision Application.

So far as Civil Revision Application No.1104/2002 is concerned, the same is filed by the original plaintiffs of aforesaid Special Civil Suit No.194/88, challenging the order of same date of the learned trial Judge passed below Exh.57, by which third party, i.e., opponents No.2 to 5 herein were permitted to be joined as co-plaintiffs in the said suit. The learned trial Judge has passed that order under Order 1 Rule 10 of C.P.C.

Being aggrieved by the aforesaid orders, the original plaintiffs have filed these Revision Applications before this Court.

The facts leading to the controversy are as under:

The applicants herein instituted a suit being Special Civil Suit No.194/1988 before the Civil Judge (S.D.) at Vadodara. The said suit is filed against the opponents No.1/1 to 1/5 herein, for specific performance of agreement to sell in respect of the suit land admeasuring 1 Acre and 31 gunthas bearing Survey No.354/1, situated at Manjalpur area of city of Vadodara, which is subsequently given final plot No.347 in Town Planning Scheme No.19. The case of the original plaintiffs in the suit is that the defendants have executed a banakhat on 11-3-1986 in favour of the plaintiffs and the plaintiffs have paid Rs.1,54,251/- to the defendants as earnest money and subsequently further amount was also paid to the defendants towards the consideration. According to the plaintiffs, an amount of Rs.2,06,251/- is paid by the plaintiffs to the defendants and that final sale deed was to be executed by the defendants after finalization of the town planning scheme. Since the defendants failed to execute the document of sell, the plaintiffs have filed the aforesaid suit for specific performance of the suit agreement, dated 11-3-1986.

The said suit was resisted by the defendants on various grounds by filing their written statement at Exh.13. During the pendency of the said suit, applicants (original plaintiffs) gave an application (pursis) at Exh.59, requesting the Court to allow them to withdraw the suit unconditionally. In the withdrawal pursis, an averment is made to the effect that the suit is filed by oversight and the plaintiffs were misguided by one broker and on inquiry, the plaintiffs came to know that the defendants have not executed any agreement to sell in favour of the plaintiffs and that agreement was also got registered by way of fraud. It is also stated in the pursis that the plaintiff subsequently came to know about the real facts and, therefore, they have shown willingness to withdraw the suit unconditionally. This application for withdrawal of the suit was given on 26-7-2002 at Exh.59.

On that very day i.e. on 26-7-2002, the third party-respondents No.2 to 5 herein gave an application under Order 1 Rule 10 of C.P.C., at Exh.57, requesting the Court to permit them to be joined as party to the suit. In the said application, it is averred by the applicants (third party), who wanted to be joined as party in the aforesaid suit, that there is an agreement to sell executed by the original owners in favour of the plaintiffs, which is dated 11-5-1986. It is also averred in the said application that subsequently the plaintiffs have agreed to sell the land in question to the applicants (third party) on 14-9-1987 and accordingly, the plaintiffs have assigned their rights in favour of the applicants (third party) by executing a banakhat dated 14-9-1987. It is also the say of the applicants (third party) that they have also filed substantive civil suits for specific performance of the agreement to sell, against the plaintiffs and defendants of the present suit. Particulars of such suits are as under.

i) Ashokbhai Jayantibhai Sheth (Opponent No.2 herein) has filed Special Civil Suit No.657/1988.

ii) Jagdishbahi Chimanlal Parikh (Opponent No.3 herein) has filed Special Civil Suit No.658/1988.

iii) Balkrishnan Madhusudan Patel (Opponent No.4 herein) has filed Special Civil Suit No.659/1988.

iv) Gopalbhai Madhusudan Patel (Opponent No.5 herein) has filed Special Civil Suit No.660/1988.

It is the case of the applicant (third party) that the plaintiffs and defendants have colluded with each other in order to defraud the applicants. It is also averred in the application that the plaintiffs may not remain present in the suit and the plaintiffs may try to see that the suit is dismissed for default. Under these circumstances, the applicants, who wanted to be joined as party in the aforesaid suit, gave an application Exh.57 requesting the Court to allow them to be joined as party in the aforesaid suit.

The learned trial Judge has decided both the applications by a common order. The learned trial Judge came to the conclusion that the applicants (third party) have got enforceable legal right by virtue of agreement dated 14-9-1987, which is executed by the plaintiffs and therefore, they are necessary party or at least proper party, since they have got direct interest in the suit property. Accordingly, the trial Court permitted the applicants to be impleaded as co-plaintiffs in the said suit. So far as withdrawal pursis given by the original plaintiffs is concerned, the trial Court came to the conclusion that the said pursis for withdrawal of the suit is not bona fide and considering the averments made in the withdrawal application, it can be said that the plaintiffs are not stating truthful version and that the plaintiffs have committed fraud with the parties as well as with the Court. According to the learned trial Judge, wrong averments have been made in the said withdrawal pursis. The trial Court has also observed that the contents of the withdrawal pursis are not correct, as, the plaintiffs have said in the pursis that they are not knowing, who are the real owners of the suit land and that the real owners have not executed Banakhat dated 11-3-1986. The trial Court, therefore, found that the plaintiffs and the defendants have colluded with each other and if the plaintiffs are permitted to withdraw the suit, the third party applicants will be deprived of their rights. The trial Court has also found that if the pursis of withdrawal of the suit is accepted, then the plaintiffs may take advantage, by taking a stand that they have not executed Banakhat dated 14-9-1987 in favour of the applicants-third party, who wanted to be joined as party in the suit. Under these circumstances, the trial Court found that the presence of the third party is necessary for the purpose of effectively and finally deciding the rights of the parties. The trial Court has also found that presence of the third party is necessary so that their rights may not be adversely affected as an agreement to sell is in their favour, which is executed by the original plaintiffs. The trial Court, ultimately,

rejected the withdrawal pursis of the original plaintiffs filed at Exh.59 and application of the third party at Exh.57 is allowed by the trial Court and the third party is permitted to be impleaded as co-plaintiffs in the aforesaid suit.

The original plaintiffs have challenged both the aforesaid orders by filing two separate Civil Revision Applications before this Court.

I have heard Mr.B.S.Patel, learned advocate appearing for the petitioners (original plaintiffs). I have also heard learned advocate Mr.D.D.Vyas along with Mr.Dhaval Vyas for respondents No.1/1 to 1/5, who are the original defendants in the aforesaid suit. I have also heard Mr.A.J.Patel with Mr.Shital Patel, learned advocate for opponents No.2 to 5, who are the applicants, who have been permitted to be joined as party to the suit by the trial Court.

Learned advocate Mr.B.S.Patel as well as learned advocate Mr.Vyas both have very vehemently submitted that the trial Court has committed error of jurisdiction in not allowing the original plaintiffs to withdraw their suit unconditionally. It is submitted that the plaintiffs have got absolute right to withdraw the suit unconditionally and, therefore, the trial Court should not have rejected the application for withdrawal of the suit. It is submitted by the learned advocate Mr.Vyas, that the opponents No.2 to 5 have already filed separate Civil Suits for specific performance of the agreement to sell and therefore, their rights can be decided and adjudicated in their respective suits and they cannot be permitted to be impleaded as co-plaintiffs in the present suit against the wish of the original plaintiffs. It is submitted by him that if the third party is permitted to be impleaded as co-plaintiffs, virtually it amounts to substituting the original plaintiffs. It is also submitted that by virtue of the impugned order, the third party is permitted to be impleaded as co-plaintiffs, even though the original plaintiffs are not willing to continue the suit in question. It is also submitted that the rights of the third party cannot be decided in the present suit and the Court has no jurisdiction to refuse the withdrawal pursis, if the plaintiffs are willing to withdraw the suit unconditionally.

It is also submitted by the learned advocate for the petitioners as well as by the learned advocate for the respondents Nos.1/1 to 1/5 that the trial Court has committed an apparent error in coming to the conclusion

that by giving such pursis for withdrawal of the suit, the plaintiffs have committed fraud with the Court as well as with the third party-applicants. It is submitted that even if it presumed that the plaintiffs have settled their dispute with the defendants, and if the plaintiffs wanted to withdraw the suit unconditionally, then also it cannot be said that the plaintiffs have committed fraud with the Court. It is further submitted that without any basis, the trial Court came to the conclusion that the action of the plaintiffs amounts to fraud with the Court. Mr.B.S.Patel has further submitted that the plaintiffs are not relying upon the averments made in the pursis for withdrawal of the suit and said pursis may be treated as simple pursis for unconditional withdrawal of the suit.

Mr.B.S.Patel, learned advocate for the petitioners has cited numerous judgements to substantiate his say that the plaintiffs have got absolute right to withdraw the suit unconditionally. It is submitted that the order of the trial Court suffers from jurisdictional error, by which the plaintiffs are not allowed to withdraw the suit unconditionally and such order is required to be set aside by this Court. It is also vehemently contended that even though the suit in question is pending before the trial Court since more than a decade, third party gave an application under Order 1 Rule 10 of C.P.C., as late as on 21-7-2002.

Mr.Vyas, learned advocate submitted that at the time when the defendants of the suit executed an agreement to sell in favour of the plaintiffs, the town planning scheme was not finalized and it is finalized subsequently. He submitted that if the third party is permitted to be joined in the suit, the cause of action will be totally changed and question of limitation will also arise, as the agreement to sell executed in favour of the applicants-third party is dated 14-9-1987 and they have been permitted to be joined as co-plaintiffs by order dated 26-7-2002. Mr.Vyas has also submitted that if the applicants are not permitted to be joined as co-plaintiffs in the suit, no prejudice is likely to cause to them, since they have already filed substantive suits, which are pending and the rights of the applicants can be decided and adjudicated in the aforesaid suits, especially when the plaintiffs and the defendants of the present suit are party to those suits.

On behalf of opponents No.2 to 5, Mr.A.J.Patel as well as Mr.Shital Patel, learned advocates have vehemently submitted that the orders in question are not revisable under Section 115 of C.P.C. It is submitted by

Mr.A.J.Patel that the order allowing third party to be joined as co-plaintiffs in the suit, is interlocutory in nature and in view of the amendment in Section 115 of C.P.C., revision against such order is not maintainable as it would not dispose of the entire suit. He submitted that so far as Civil Revision Application No.1103/2004 is concerned, the same is not maintainable in view of the amendment in Section 115 of C.P.C., as it is filed against an interlocutory order passed by the trial Court below Exh.57 by which the trial Court has permitted the third party to be impleaded as party to the suit.

Mr.A.J.Patel, however, submitted that so far as Civil Revision Application challenging the order passed below Exh.59 is concerned, the same would be maintainable as, ultimately, by the impugned order the plaintiffs are not permitted to withdraw their suit unconditionally and if that application was allowed, the entire suit can be said to have been terminated. Mr.A.J.Patel further submitted that the original plaintiffs have assigned their rights in favour of the applicants, as subsequently an agreement to sell is executed by the plaintiffs in favour of the applicants and, therefore, the applicants have a right to continue the said suit even if the original plaintiffs wants to withdraw the suit. Mr.A.J.Patel further submitted that the original plaintiffs have tried to defraud the applicants, as after executing the document of agreement to sell in their favour, ultimately, the plaintiffs have tried to settle their dispute with the original land owner. Mr.A.J.Patel further submitted that it is true that the applicants have also filed separate suits in connection with the said agreement to sell executed by the original plaintiffs, but if the original plaintiffs are permitted to withdraw the suit in question, certain admissions made by the original plaintiffs, which may help the applicants-third party, will also go away. He also submitted that if the averments made in the pursis for withdrawal are accepted by the Court, it may affect the applicants' case, so far as suits filed by the applicants are concerned.

Mr.A.J.Patel further submitted that in view of the agreement executed in favour of the applicants, they have right to be joined as co-plaintiffs in the suit in question. He further submitted that revision being a discretionary remedy, this Court is not bound to interfere with the aforesaid order of the trial Court, especially when substantial justice is done by the impugned order. Mr.A.J.Patel also very vehemently submitted that in view of the agreement to sell executed

in favour of the applicants by the original plaintiffs, the applicants are entitled to proceed with the aforesaid suit, and they should be permitted to continue the said suit. It is also submitted by him that even if the original plaintiffs are not willing to continue the suit, the applicants can subsequently request the Court to transpose the original plaintiffs as defendants. Mr.A.J.Patel has also submitted that looking to the conduct of the original plaintiffs and defendants, the order of the trial Court, by which substantial justice is done to the applicants, is not required to be interfered with by this Court in a revision under Section 115 of C.P.C. Mr.A.J.Patel has also relied upon certain documentary evidence in order to substantiate his say in connection with the merits of the issue. He has also relied upon the agreement to sell executed by the original plaintiffs in favour of the applicants.

Mr.A.J.Patel, has also cited various judgements to substantiate his say that the trial Court was justified in allowing the applicants to be joined as co-plaintiffs in the suit, under the provisions of Order 1 Rule 10 of C.P.C. Mr.A.J.Patel, therefore, submitted that both these revision applications are required to be dismissed and the applicants should be permitted to continue the suit by permitting them to be impleaded as co-plaintiffs in the said suit.

Mr.A.J.Patel has also further submitted that it cannot be said that the trial Court has committed any jurisdictional error or it cannot be said that the trial Court has exercised it jurisdiction illegally or with material irregularity.

I have heard learned advocates at great length. I have also gone through the documentary evidence on record.

Since Mr.A.J.Patel has raised preliminary objection about the maintainability of the revision application, the said question is required to be dealt with first. Mr.A.J.Patel, learned advocate for opponents No.2 to 5 has vehemently submitted that since by the impugned order, the third party applicant is permitted to be impleaded as co-plaintiffs, such order is interlocutory in nature and in view of amendment in Section 115 of C.P.C., revision application against such an interlocutory order is not maintainable. In this connection, it is required to be noted that the applicants i.e., respondents No.2 to 5 herein gave an application Exh.57, with a request that they may be

permitted to be joined as co-plaintiffs on the same day, i.e., on the date on which Exh.59 application was given by the original plaintiffs of the suit, requesting the Court to permit them to withdraw the suit unconditionally. The learned trial Judge has disposed of both the applications by common order. The learned trial Judge has firstly dealt with the withdrawal pursis submitted at Exh.59 by the original plaintiffs. The trial Judge has rejected the application Exh.59 and plaintiffs were not permitted to withdraw their suit. Subsequently, the trail Judge has allowed the application at Exh.57 submitted by the third party and the third party was permitted to be impleaded as co-plaintiffs in the suit.

So far as withdrawal application Exh.59 is concerned, if that application is allowed, it would result into final disposal of the suit. The petitioner-original plaintiffs have challenged the order below Exh.59 by which original plaintiffs are not permitted to withdraw the suit unconditionally. If ultimately the original plaintiffs are permitted to withdraw the suit by allowing said application at Exh.59, naturally, its effect would be that the entire suit would be terminated. Mr.A.J.Patel has fairly submitted that so far as order below Exh.59 is concerned, the same is revisable under the provisions of Section 115 of C.P.C., as if that application is allowed, then it will dispose of the suit as a whole. He submitted that however, revision application filed against the order below Exh.57, by which the trial Court has permitted the third party to be joined as party to the suit, as such order is interlocutory in nature, revision against such order is not maintainable.

In my view, there is hardly any substance in the aforesaid preliminary contention raised by Mr.A.J.Patel. Considering the nature of the aforesaid two applications, both the applications cannot be considered separately, as ultimately, if the original plaintiffs are permitted to withdraw the suit by allowing application Exh.59, naturally, there is no question of considering application of third party filed at Exh.57, as the entire suit would come to an end. Even the trial Court has decided both the applications together and disposed of by common order and the trial Court has first decided application at Exh.59 by which the trial Court has rejected the prayer of the original plaintiffs to withdraw the suit unconditionally and subsequently, consequential order is passed below Exh.57, by which the third party is permitted to be impleaded as party.

However, if Exh.59 is allowed, naturally, no suit would remain on file and in that case, there is no question of permitting the third party to be impleaded as co-plaintiffs in the suit. As a matter of fact, if application Exh.59 is allowed, Exh.57 application will automatically become infructuous, as there is no question of permitting the third party to be impleaded as party to the suit. Considering the aforesaid aspect of the matter as well as considering the fact that if the plaintiff is permitted to withdraw the suit, the whole suit will be disposed of finally, such order would be revisable order under the amended provision of C.P.C. So far as application Exh.57 is concerned, it cannot be treated as a separate application and under these circumstances both the applications are required to be considered together, while deciding the question of withdrawal of the suit.

Under these circumstances, there is no substance in the preliminary objection raised by Mr.A.J.Patel that since the order passed below Exh.57 is interlocutory in nature, this revision is not maintainable.

Coming to the facts of the case, the plaintiffs instituted a suit for specific performance of agreement to sell executed by the defendants on 11-3-1986, which is a registered Banakhat. Subsequently, the plaintiffs have also executed another agreement to sell in favour of the respondents No.2 to 5 herein, which is dated 14-9-1987. The respondents No.2 to 5 have also instituted separate Special Civil Suits for enforcing the aforesaid agreement to sell dated 14-9-1987. In the said suits, plaintiffs as well as the defendants of the suit in question are party defendants. Under these circumstances, the main question, which requires consideration is whether the original plaintiffs have absolute right to withdraw the suit unconditionally and whether the applicant-third party is entitled to apply under Order 1 Rule 10 for being joined as a party to the suit.

Mr.B.S.Patel for the original plaintiffs as well as Mr.Vyas appearing for the original defendants of the suit have relied upon the decision of the Apex Court in the case of Ramprasad Dagaduram v. Vijay kumar Motilal Hirakhanwala and Ors., reported in 1967 S.C. 278. In the aforesaid judgement, it has been observed in para 19 as under :

"19. The Court has power to add a new plaintiff at any stage of the suit, and in the absence of a statutory provision like S.22 the suit would be regarded as having been commenced

> by the new plaintiff at the time when it was first instituted. But the policy of S.22 is to prevent this result, and the effect of the section is that the suit must be regarded as having been instituted by the new plaintiff when he is made a party, see Ramsebuk v. Ramlall Koondoo, (1881) ILR 6 Cal 815. The rigour of this law has been mitigated by the proviso to S.21(1) of the Indian Limitation Act, 1963, which enables the Court on being satisfied that the omission to include a new plaintiff or a new defendant was due to a mistake made in good faith, to direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. Unfortunately, the proviso to S.21 (1) of the Indian Limitation Act, 1963 has no application to direct that the suit should be deemed to have been instituted on a date earlier than November 4, 1958."

It has been submitted by Mr.Vyas that by permitting the applicants to be joined as co-plaintiffs in the suit, the trial Court has not considered the fact that at the time, when they were permitted to be joined, their claim has already become time barred as agreement to sell was executed in their favour as back as in the year 1987 and now they are sought to be joined as party to the suit in the year 2002. Mr.Vyas, learned advocate also further submitted that if the third party-applicants are permitted to be joined in the suit, even the cause of action will be changed and substantial amendment is required to be made in the pleadings. He further submitted that if the third party is allowed to be joined in the suit, straightway the third party cannot proceed with the suit on same averments, on which the original plaintiffs have filed the suit.

On behalf of the petitioners as well as on behalf of the respondent No.1 reference is also made to the decision of the Apex Court in the case of Ms.Hulas Rai Baij Nath Vs. Firm K.B.Bass and Co., reported in 1968 Supreme Court, 111. In that case, it has been held by the Supreme Court that Order 23 Rule 1 Sub-rule (1) of C.P.C., gives an unqualified right to a plaintiff to withdraw from a suit and, if no permission to file a fresh suit sought under Sub-rule (2) of the Rule, the plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in respect of the subject matter under sub-Rule (3) of the Rule. It has been held by the Apex Court in the

said judgement that there is no provision in the Code of Civil Procedure which requires Court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it. It has also been held that different considerations may arise where the set-off may have been claimed under Order 8 of Civil Procedure Code, or a counter claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit.

Relying upon the said judgement, it is vehemently argued by Mr.Vyas and Mr.B.S.Patel that the plaintiff has absolute right to withdraw the suit unconditionally and at the most, the Court can impose cost before permitting the plaintiff to withdraw the suit.

Reference is also made by Mr.Vyas to the decision of the Apex Court in the case of T.L.Muddukrishnan and Anr. Vs. Smt.Lalitha Ramchandra Rao, reported in AIR 1997 SC 772. The said decision is in connection with granting of amendment under Order 6 Rule 17 of C.P.C., for seeking specific performance of contract, after expiry of three years from the date fixed by parties under contract. In the said case, amendment was rejected on the ground that cause of action, which was required to be stated initially, was not pleaded and it was found that the rejection of amendment application was proper.

Reference is also made by Mr.Vyas to the decision of the Apex Court in the case of Ajmera Housing Corporation Vs. Amrit M.Patel (dead) through LRs & ors., reported in AIR 1998 SC 2542. In the aforesaid judgement, appellant before the Supreme Court was a third party to the suit, which was pending before the City Civil Court at Ahmedabad. In the said case, the trial Court has permitted the legal representatives of the plaintiff builder to withdraw the suit and rejected the application given by the developer for being substituted as plaintiff in the said suit. In para 14 of the judgement, Court has observed as under :

"14. We have set out the respective contentions of the parties in sufficient detail. We may state that the learned senior counsel for the appellant has, and in our view, rightly not relied upon Order 22, Rule 10, CPC as it is nobody's case that there is an assignment or devolution of interest during the pendency of the suit. So far as the reason given by the trial Court and the High Court for rejecting the case of the appellant under Order 1, Rule 10 and

> Section 146, C.P.C. are concerned, we do not think it proper to go into them in detail inasmuch as, in our opinion, the above issues have to be thrashed out in a properly constituted suit. We think, it neither desirable nor in the interests of parties, to go into the above questions in an appeal arising out of an interlocutory application. The problem is that if we interpret the agreements, for the purpose of the application under Order 1, Rule 10 or Section 146, C.P.C., our view is likely to prejudice any decision on the same questions if taken up either in this suit or in any separate suit that may be filed by the appellant. The reason is this. Any decision in favour of the appellant to implead him as a plaintiff would necessarily require us to go into the rights of the appellant-developer vis-a-vis the original plaintiff-builder and vis-a-vis the defendants, owners - under the two agreements. This may prejudice the case of the owners and the legal representatives of the builders in this very suit. Similarly, any decision against the appellant will prejudice the appellant's case if he files an independent suit. In the above-said peculiar circumstances of the case we are of the view that this is not a fit case to go into the merits and no interference is called for under Article 136 of the Constitution of India. The plaintiff, if he is so advised, may pursue his remedies by way of a fresh suit. The observations or findings of the trial Court or of the High Court in the impugned judgements as to the rights the plaintiff under the agreement dated 26-2-88 - whether the observations or findings are in favour or against the plaintiff are kept open for adjudication in such a suit. We are not to be understood as having said anything upon the maintainability or non-maintainability of any such suit or about the rights of any of the parties who may be impleaded therein."

Mr.Vyas after relying upon the said observations, has submitted that the right of the third party can be very well be adjudicated in the substantive suits, which are already filed by the third party and the same are pending and, the third party cannot be permitted to be joined in the present suit as party, under Order 1 Rule 10 of C.P.C.

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Mr.Vyas has also relied upon the decision of the Apex Court in the case of Mukesh Kumar and Others v. Harbans Waraiah and others, reported in AIR 2000 SC 172, wherein in para 9 the Court has observed as under :

"9. Section 21 of the Limitation Act provides that wherever on institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he is so made a party. However, if Court is satisfied that omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. Sub-sec.(2) thereof makes it very clear that these provisions would not apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of the suit or where plaintiff is made a defendant or a defendant is made a plaintiff. Section 21 has no application to cases of transposition of parties. Since transposition also involves addition of a plaintiff or a defendant as the case may be, into the suit as original filed, sub-sec.(2) of S.21 of the Limitation Act applies only to those cases where the claim of the person transposed as plaintiff can be sustained on the plaintiff as originally filed or where person remaining as a plaintiff after the said transposition can sustain his claim against the transposed defendant on the basis of the plaint as originally filed. For sub-sec. (2) to apply all that is necessary is that suit as filed originally should remain the same after the transposition of the plaintiff and there should be no addition to its subject matter. Where a suit as originally filed is properly framed with the proper parties on record the mere change of a party from array of defendants to that of plaintiff under Order 1 Rule 10 of the Civil Procedure Code will not make him a new plaintiff and will not bring the case within this Section and in such a case sub-Section (2) will not apply. For instance, where one of the plaintiffs refusing to join as plaintiff was first made a defendant and thereafter transposed as a plaintiff, he is not a new plaintiff. Therefore, the argument advanced on behalf of the appellants

that the suit is barred by limitation in so far as Ashwani Kumar is concerned inasmuch as he is transposed as a plaintiff after the period of limitation does not stand to reason."

Mr.Vyas has also relied upon the decision reported in AIR 2000 SC 2699.

Reference is also made by Mr.Vyas to the decision of this Court in the case of Malaji Budhaji Thakor Vs. Lalaji Jagaji Thakor & Anr., 1999 (2) GCD 1645, wherein this Court has also held that the third party cannot object the withdrawal of the suit, more so claiming that he may be impleaded as party to the suit. The facts of that case were more or less similar to the facts of the present case. In para 10 of the aforesaid judgement, this Court has observed as under :

"10. The respondent No.2 prayed in the application under Order 1 Rule 10 of Code of Civil Procedure, 1908 for his impleadment in suit as plaintiff No.2. The plaintiff petitioner has not admitted the claim of the respondent No.2. Not only this the defendant respondent No.1 has also not admitted his claim. The respondent No.2 now wants to establish his rights qua the plaintiff petitioner in the suit property. So in this suit the dispute now to be decided in between the third party respondent No.2 and plaintiff-petitioner. But in the suit both under the Court order if it is granted his application, will be the plaintiffs. More so how a third party can be impleaded as a plaintiff in the suit where the plaintiff in suit is not agreeable for his impleadment. The learned Trial Court has lost site of the one important aspect that in a suit filed by the plaintiff after paying the Court fee the third party wants to get a decision for his rights. Not only this in the writ on such cause of action is pleaded and also not any prayer. How altogether a different, distinct and separate cause of action can be gone into and decided in this suit and that too between plaintiffs themselves. Whether by this simple impleadment of third party as plaintiff in suit in which the original plaintiff come on different cause of action against a person other than third party this dispute between them can be gone into and decided ? An obvious reply to this question will certainly be in negative. In the suit the third party respondent No.2 is neither a

necessary or proper party."

On the other hand, Mr.A.J.Patel has relied upon the decision of the Apex Court in the case of Sm.Saila Bala Dassi v. Sm.Nirmala Sundari Dassi and another, reported in AIR 1958 SC 394. In para 10 of the aforesaid judgement, the Supreme Court has observed as under :

"10. We accordingly set aside the order of the Court below dated August 6, 1956 and direct that the appellant be brought on record as additional appellant in Appeal No.152 of 1955. As Sudhir Kumar Mitter, the appellant now on record, has dropped the fight with the first respondent, we conceive that no embarrassment will result in there being on record two appellants with conflicting interest. But, in any event, the Court can, if necessary, take action suo motu either under O.1, R.10 or in its inherent jurisdiction and transpose Sudhir Kumar Mitter as second respondent in the appeal, as was done in In re Mathews; Oates v. Mooney, 1905-2 Ch.460 (G), and Vanjiappa Goundan v.Annamalai Chettiar, 1939-2 Mad LJ 551 (AIR 1940 Mad 69) (H). As for costs, the appellant should, in terms of the order of this Court granting her leave to appeal, pay the contesting respondent her costs in this appeal. The costs of and incidental to the application in Appeal No.152 of 1955 in the High Court will abide the result of that appeal."

Mr.A.J.Patel has also relied upon the decision of the Allahabad High Court in the case of Anurag Sharma v. Xth Additional District Judge, Moradabad and Ors., reported in Current Civil Cases, 1991 (2), page 158.

Reference is also made to various judgements of various High Courts in connection with the provisions of Order 1 Rule 10 of C.P.C.

Mr.A.J.Patel has also relied upon the decision in the case of Satish Mohan Bindal v. The State of U.P., reported in AIR 1986, Allahabad, page 126 to substantiate his say that admission in pleading, by themselves can be made foundation of rights of the parties. The said judgement was cited in order to substantiate his say that if the original petitioner is permitted to withdraw the suit unconditionally, it will wipe out the admissions made in the present suit.

At this stage, Mr.B.S.Patel, has submitted that

the plaintiffs are not relying upon any averments made in the pursis and averments made in the pursis may not be taken into consideration, withdrawal may be treated as unconditional withdrawal. In that view of the matter, even if any averment is made in the pursis, those averments will have no application in any manner and the applicant-third party can continue their suits and they can rely even upon the so called admissions made by the plaintiffs in the suit in question. Of course, question regarding admissions made by the plaintiffs, which are helpful to the third party-applicants, is required to be considered by the Court before whom suits are pending.

Mr.A.J.Patel has also relied on the decision of the Supreme Court in the case of Shyam Singh v. Daryao Singh (dead) by LRs. and others., reported in 2003 AIR SCW 6315. The Supreme Court, after considering the scheme of Section 15 (b) of the Specific Relief Act has observed as under in para 10 :

"10. As is to be seen from the provisions of S.15 (b) of the Specific Relief Act, 1963, specific performance of the contract may be obtained by 'any party thereto' or 'their representative in interest.' This expression clearly includes the transferees and assignees from the contracting party in whose favour the right exists. Such right of seeking specific performance would, however, be not available in terms of proviso below Cl. (b) where "the contract provides that the 'interest shall not be assigned.' "

Relying upon the said judgement, it is argued by Mr.Patel that an assignee third party has right to continue the suit in place of the original plaintiffs.

Mr.A.J.Patel has also relied upon the decision of the division Bench of this Court in the case of Mohanlal Motilal Sevak Vs. Bhikhabhai Himatlal Sevak & Anr. reported in 1978 GLR page 865. The aforesaid case is in connection with the partition suit. The division bench of this Court has held that the rights of the plaintiffs and the defendants in a partition suit are so intermixed and inter-twined that any action on the part of the appellant or a plaintiff may unduly prejudice a defendant or defendants and in such a case interest of justice require that a respondent who is likely to be unduly prejudiced by the withdrawal of the appeal should be transposed as an appellant and should be permitted to prosecute the appeal so that he gets relief to which he

is entitled on merits. It has also been held by the Division Bench of this Court that it is within the power of the Court to take action suo motu, if it is necessary to do so, either under Order 1, Rule 10 or in its inherent jurisdiction and to transpose the appellant as a respondent in the appeal. It has also been held that such transposition is not subject to the bar of limitation.

Mr.A.J.Patel has also relied on the decision of the Supreme Court in the case of Habiba Khatoon v. Ubaidul Haq and others, reported in AIR 1997 SC 3236. In that case, question was regarding whether the beneficiaries under an agreement got personal right and whether assignment by beneficiaries of such rights to stranger is prohibited. It has been held by the Supreme Court that agreement of reconveyance could not be interpreted as conferring personal right of reconveyance on son of the original vendor if his mother - original vendor, the first beneficiary under the Agreement of repurchase died within that period merely on basis of term 'only' employed by the document. The word 'only' signified a situation wherein on the death of original vendor within three years of the Agreement one of her heirs, namely, her son and his own children as contra-distinguished with other heirs of original vendor were given a priority right to enforce their claim to repurchase the suit house. With a view to exclude the other heirs of original vendor from the scheme of priorities that the word 'only' was used in the document.

Mr.A.J.Patel has also relied upon the decision of this Court in the case of Jethiben W/o Gauri Laxmidas v. Maniben W/o Patel Ambalal Mohanlal & Anr., reported in 1983 (2) GLR 993, wherein this Court has held that proforma defendant, who had identical interest with the plaintiff can be transposed as plaintiff. It is held that transposition cannot be given to litigant as a chance to avoid filing of another suit. However, the Court has held that if the defendant in the case has different cause of action, which is in the form of transaction between the petitioner and the opponent No.1, such transaction cannot be allowed.

Mr.A.J.Patel has also relied upon various other judgements in connection with Order 1 Rule 1 of C.P.C. Reference is also made to the decision in the case of Pankaja and another v. Yellappa (dead) by LRs. and others, reported in 2004 (6) SCC 415, wherein the Apex Court has held that while deciding the amendment application under Order 6 Rule 17 of C.P.C., discretion

of the Court in this regard depends upon the facts and circumstances of the case.

Mr.A.J.Patel has relied upon following judgements to substantiate his say that the third party has a right to be joined as party in the suit, as according to him, the third party is entitled to get appropriate relief against the defendants in the present suit.

1) 1994 (2) Current Civil Cases, 231
2) 1992 (2) Current Civil Cases, 370
3) 2001 (1) Current Civil Cases, 241
4) 1966 GLR 1123
5) AIR 1980 Allahabad 36
6) AIR 1993 SC 2449
7) AIR 1974 SC 471
8) AIR 1978 Calcutta 443
9) AIR 2002 SC 1334
10) 2004 AIR SCW 184
11) AIR 1936 Madras 630
12) 1994 (1) GLH 81
13) AIR 1985 Punjab & Haryana 157
14) AIR 1987 Orissa 1
15) 1999 (1) GLR 122
16) AIR 2003 SC 2434
17) AIR 1999 SC 958
18) 1999 (1) GLH 984
19) 2002 (3) GLR 1940
20) 1999 (2) GCD 1645

It is required to be noted that the plaintiff has got absolute right to withdraw his suit unconditionally as held by the Apex Court in the case of Ms.Hulas Rai Baij Nath Vs.Firm K.B.Bass and Co., reported in 1968 Supreme Court, 111, of course, such withdrawal is subject to the payment of cost to the other side.

So far as decision of this Court in the case of Malaji Budhaji Thakor v. Lalaji Jagaji Thakor & Anr., reported in 1999 (2) GCD, 1645, is concerned, in the said case, during the pendency of the suit, a third party applied for being joined as party, wherein this Court has clearly held that such third party cannot be allowed to be joined as a co-plaintiff in the said suit.

It is required to be noted that it is no doubt true that the respondents No.2 to 5 herein (third party) have already filed substantive civil suits for specific performance of an agreement executed in their favour and all those suits are still pending. In the aforesaid suits, even the plaintiffs of the present suit as well as

the opponents No.1/1 to 1/5 are party defendants.

I have considered the argument of both the sides. The issue involved in this matter is very simple, whether the plaintiff has absolute right to withdraw the suit unconditionally and under what circumstances the Court can refuse such withdrawal. In my view, the trial Court has committed error of jurisdiction by not permitting the original plaintiffs to withdraw their suit unconditionally. It is required to be noted that it cannot be said that there is common cause of action so far as rights of original plaintiffs and third party are concerned. It cannot be said that there is common interest of the plaintiffs and the defendants, like common interest of parties in a partition suit. In my view, simply because the plaintiffs have made certain admission in the suit, that itself, cannot be made the basis for refusing the withdrawal of the suit, if the plaintiffs wanted to withdraw the suit unconditionally. The applicant-third party can rely upon such admissions as per the provisions of the Indian Evidence Act, in the suits filed by them, which are still pending.

It is also required to be noted that the third party- applicants are not even defendants in the present suit and for the first time, they gave an application Exh.57, requesting the Court to permit them to be joined as co-plaintiffs in the suit. If the respondents No.2 to 5 have any independent right, naturally they can pursue the same in the suits, which they have already filed.

So far as argument of Mr.A.J.Patel regarding Section 15 (b) of the Specific Relief Act is concerned, which provides that the specific performance of the contract should be obtained by the representative in interest of the principal of any party thereto, the said aspect can be highlighted by the applicants in the suits, which they have already filed and which are pending. The question whether there is any assignment in favour of the applicants, is a question which is required to be decided in the suits filed by them and withdrawal of the present would not in any way prejudice the rights of third party-applicants and the suits filed by the third party-applicants are required to be decided on their own merits and the applicants can raise all the points available to them in those suits.

It is difficult to appreciate the reasoning given by the trial Court wherein the trial Court has stated that by giving said pursis, the plaintiffs have committed fraud with the Court. It is also required to be noted

that if the plaintiffs have settled their dispute with the original defendants and if the plaintiffs wants to withdraw the suit unconditionally, the Court has no jurisdiction to refuse such unconditional withdrawal, unless there is any counter claim or set-off claimed by the defendant in the said suit. It is required to be noted that a suit for partition stands on different footing. In such partition suits, the cause of action of the plaintiff and some of the defendants may be common against some of the defendants, naturally, in such a case, Court can permit such defendants to be transposed as plaintiffs but that is not the situation in the present case. In my view, therefore, the trial Court has committed error of jurisdiction by refusing such unconditional withdrawal of the suit. When the plaintiff wants to withdraw the suit, the conduct of the plaintiff is not relevant for permitting him to withdraw the suit if he wanted to withdraw the suit unconditionally. It is required to be noted that the question regarding whether the applicants are required to be joined as party to the suit under Order 1 Rule 10 of C.P.C., arises subsequently for determination and the first question, which requires consideration is whether the plaintiff can be permitted to withdraw the suit unconditionally and if it is held that the plaintiff is entitled to withdraw the suit, naturally, there is no question of permitting so called third party to be impleaded in the suit.

Even otherwise, it cannot be said that there is common cause of action so far as plaintiffs and third party applicants are concerned. Even if the third party is permitted to be joined in the suit, question of limitation is also required to be considered from the date on which the third party applicants are permitted to be joined as co-plaintiffs. It is required to be noted that even the nature of evidence in both proceedings will be different. It is also required to be noted that original owner of the property i.e., respondent No.1 herein is not even party to the agreement executed by the plaintiffs in favour of the respondents No.2 to 5 herein.

It is not in dispute that even after permitting respondents No.2 to 5 to be joined as co-plaintiffs in the present suit, substantial amendment is required to be made in the present suit. It is, therefore, clear that this is not a case in which simply by permitting respondents No.2 to 5 to be joined in the present suit as co-plaintiffs, suit can be proceeded in the same manner in which it is proceeded by the original plaintiffs. Considering the facts and circumstances of the case, even reference to provisions of Order 1 Rule 10 will have no

application to the facts of the present case, as the original plaintiffs wants to withdraw the suit unconditionally and in that place, third party wants to be joined as co-plaintiffs in the pending suit after a period of about more than ten years. The effect of the impugned order of the trial Court is that the third party is permitted to be substituted in place of the original plaintiffs of the suit, which, in my view, is not permissible. Even otherwise, as stated above, if the third party is permitted to be joined in the suit, cause of action will be totally changed and, therefore, the third party cannot continue the said suit on same cause of action and substantial amendment is required to be made in the plaint. So far as this aspect is concerned, the same is not denied even by Mr.A.J.Patel, learned advocate appearing for the third party-applicants.

As pointed out earlier, the respondents No.2 to 5 herein, who wants to be joined in the present suit can raise all available contentions in their own suits, including the admissions, if any, made by the present plaintiffs in the suit in question.

The trial Court, therefore, has failed to exercise its jurisdiction by not permitting the plaintiff to withdraw the suit unconditionally and has exercised its jurisdiction with material irregularity, therefore, the order in question is required to be revised by this Court in this revision under Section 115 of C.P.C. The plaintiffs of the original suit cannot be compelled to continue their suit, even if they want to withdraw it unconditionally, by permitting the third party to be joined as co-plaintiffs along with the original plaintiffs.

Considering the matter from aforesaid angle, in my view, the trial Court has gravely erred in not allowing the plaintiffs to withdraw the suit unconditionally, which is an absolute right of the plaintiffs. In a given case, as stated above, if there is any counter claim or set-off and if the plaintiffs wants to withdraw the suit unconditionally, the Court can refuse to grant such permission. In a given case, if there is same cause of action like in a suit of partition, the Court can certainly permit the defendants to be transposed as plaintiffs, but so far as facts of the present case are concerned, in my view, the trial Court is not justified in permitting the third party to be joined as co-plaintiffs in the suit.

Under these circumstances, the impugned orders

passed below Exh.57 and Exh.59 are quashed and set aside. The plaintiff of Special Civil Suit No.194/1988 is permitted to withdraw the suit unconditionally. The effect of this order would be that the suit stands disposed of from the file of learned Civil Judge (S.D.) Vadodara.

Considering the argument of Mr.B.S.Patel for the original plaintiffs that they are not pressing any contents of the pursis, contents of the pursis for withdrawal of the suit stands deleted.

Mr.A.J.Patel, however, submitted that since the original plaintiffs and defendant has committed fraud with respondents No.2 to 5, applicants-respondents No.2 to 5 may be allowed to continue the suit in place of original plaintiffs. However, the suit cannot be allowed to continue, as the original plaintiffs wants to withdraw the same unconditionally. At this stage, Mr.A.J.Patel, submitted that since the petitioner would like to go to the Supreme Court, the order in question may be stayed for some time. In the facts and circumstances of the case, present order is stayed upto 30th October, 2004.

At this stage, Mr.Vyas, learned advocate for respondents No.1/1 to 1/5 has submitted that the suits filed by the respondents No.2 to 5 are pending since 1988 and injunction is also operating against the plaintiffs and the defendants of the present suit, therefore, he requested that the suits, which are pending since last more than 15 years may be directed to be decided at the earliest.

Since the suits filed by the respondents No.2 to 5 are pending since long, the trial Court may try to dispose of said suits expeditiously.

Accordingly, both these Civil Revision Applications are allowed. Rule is made absolute. No Costs.

Record and Proceedings be sent back to the trial Court forthwith.

(P.B.Majmudar,J.)

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